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IN THE
COURT OF APPEALS OF INDIANA

STEVEN A. WRIGHTSMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0604-CR-199
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0412-FB-32

January 9, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Steven A. Wrightsman (Wrightsman), appeals his sentence for two Counts of criminal confinement resulting in serious bodily injury, Class B felonies, Ind. Code § 35-42-3-3(a)(1)(b)(2)(B); and his adjudication as a habitual offender, I.C. § 35-50-2-8.

We affirm in part, reverse in part, and remand with instructions.

ISSUE

Wrightsman raises one issue on appeal, which we restate as follows: Whether the trial court properly sentenced Wrightsman.

FACTS AND PROCEDURAL HISTORY

On September 12, 2004, Wrightsman and several of his friends confined and severely beat Marcus Piercy (Piercy) with fists and other objects. As a result of the beating, Piercy suffered cuts, contusions, internal bleeding, and extreme pain. Similarly, approximately a week later on September 20, 2004, Wrightsman and his friends confined and severely beat Clifton Windham (Windham). Windham suffered extreme pain, welts, cracked ribs, contusions, and a broken nose.

On December 9, 2004, the State filed an Information, charging Wrightsman with the following offenses against Piercy: Count I, criminal confinement while armed with a deadly weapon, a Class B felony, I.C. § 35-42-3-3(a)(1)(b)(2)(A); Count II, criminal confinement resulting in serious bodily injury, a Class B felony, I.C. § 35-42-3-3(a)(1)(b)(2)(B); Count III, battery committed by means of a deadly weapon, a Class C felony, I.C. § 35-42-2-2; Count IV, battery resulting in serious bodily injury, a Class C

felony, I.C. § 35-44-2-2; and Count V, intimidation, a Class D felony, I.C. § 35-45-2-1(a)(1)(b)(1). On the same day, the State charged Wrightsman with the following offenses against Windham: Count VI, criminal confinement while armed with a deadly weapon, a Class B felony, I.C. § 35-42-3-3(a)(1)(b)(2)(A); Count VII, criminal confinement resulting in serious bodily injury, a Class B felony, I.C. § 35-42-3-3(a)(1)(b)(2)(B); Count VIII, battery committed by means of a deadly weapon, a Class C felony, I.C. § 35-42-2-1; Count IX, battery resulting in serious bodily injury, a Class C felony, I.C. § 35-42-2-1(a)(3); and Count X, intimidation, a Class D felony, I.C. § 35-45-2-1(a)(1)(b)(1). Additionally, with respect to both victims, the State charged Wrightsman with Count XI, conspiracy to commit battery, a Class C felony, I.C. § 35-41-5-2. The State also filed an Information for habitual offender, I.C. § 35-50-2-8.

On September 2, 2005, Wrightsman entered into a plea agreement with the State wherein he agreed to plead guilty to two Counts of criminal confinement resulting in serious bodily injury, Class B felonies, and the habitual offender charge in exchange for the State dismissing the remaining Counts at the time of sentencing. With regard to sentencing, the plea agreement specified that Wrightsman would be sentenced to concurrent sentences with the executed portion not to exceed forty years. In addition, the agreement stated that Wrightsman "waives notice of aggravating circumstances and factors for sentencing purposes and waives his/her right to a jury to decide aggravating circumstances and factors. [Wrightsman] consents to judicial fact-finding regarding aggravating and mitigating factors to determine the appropriate sentence." (Appellant's App. p. 35). On November 10, 2005, during the sentencing hearing, the trial court

sentenced Wrightsman to concurrent sentences of twenty years imprisonment on each of the criminal confinement Counts and to a sentence of twenty-five years on the habitual offender adjudication to be served consecutively to the other sentences for a total sentence of forty-five years executed with five years suspended to probation.

Wrightsman now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Wrightsman contends that the trial court abused its discretion when sentencing him to a forty-five year term. Specifically, Wrightsman asserts that the trial court (1) failed to consider a valid mitigator; (2) found three invalid aggravators; and (3) imposed a sentence which was inappropriate in light of his character and nature of the crime.

I. *Standard of Review*

Sentencing decisions generally rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Powell v. State*, 751 N.E.2d 311, 314 (Ind. Ct. App. 2001). When a trial court enhances a sentence, the trial court is required to state its specific reasons for doing so. *Id*. The sentencing statement must: (1) identify significant aggravating and mitigating circumstances; (2) state the specific reason why each circumstance is aggravating or mitigating; and (3) demonstrate that the aggravating and mitigating circumstances have been weighted to determine that the aggravators outweigh the mitigators. *Id*. at 315. We examine both the written sentencing order and the trial court's comments at the sentencing hearing to determine whether the trial court adequately explained the reasons for the sentence. *Id*. A sentence enhancement will be affirmed in spite of a trial court's failure to specifically articulate its reasons if the record

indicates that the court engaged in the evaluative processes and the sentence imposed was appropriate in light of the nature of the offense and character of the offender. *See id.*

II. *Sentencing*[1]

Initially, we note that Wrightsman's plea agreement contains language which purportedly amounts to a *Blakely* waiver. In particular, the agreement stipulates that Wrightsman "consents to judicial fact finding regarding aggravating and mitigating factors to determine the appropriate sentence." (Appellant's App. p. 35). In *Blakely*, the United States Supreme Court applied the rule set forth in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which stated, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Blakely v. Washington*, 124 S.Ct. 2531, 2536 (2004). Nonetheless, the Court also stated, "[b]ut nothing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty." *Id*. at 2541; *see also Huffman v. State*, 825 N.E.2d 1274, 1276 (Ind. Ct. App. 2005), *trans. denied*.

[1] Wrightsman's offenses were committed on September 12 and 20, 2004. Effective April 25, 2005, the Indiana Legislature amended the sentencing statutes to permit a trial court to impose any sentence authorized by statute or the Indiana Constitution regardless of the presence or absence of aggravating or mitigating circumstances. I.C. § 35-38-1-7.1(d). Because Wrightsman committed the present offenses prior to the effective date of the sentencing amendments, his case is governed by the law in effect prior to the sentencing amendments. *See Richards v. State*, 681 N.E.2d 208, 213 (Ind. 1997).

Accordingly, here, Wrightsman properly waived his rights to have a jury hear the evidence for sentencing purposes.

A. *Aggravators*

First, Wrightsman claims that the trial court improperly cited three aggravators. In its sentencing statement, the trial court identified the following aggravating factors: (1) Wrightman's significant criminal history, (2) the fact that he was on probation when committing the instant offense, (3) his history of drug abuse, (4) prior attempts at rehabilitation have failed, and (5) the nature and circumstances of the crime. Wrightsman now alleges that the latter three aggravators are invalid. We caution Wrightsman that by conceding the two valid aggravators of criminal history and probation, the sentence enhancement is sufficiently supported. Indiana case law has long held that a sentence enhancement may be supported by a single valid aggravating circumstance. *See White v. State*, 846 N.E.2d 1026, 1034 (Ind. Ct. App. 2006), *trans. denied*. Nevertheless, we will address Wrightsman's arguments on the merits.

We conclude Wrightsman's long history of substance abuse to be a proper aggravator. The record supports a substantial and continuing drug abuse without indicating that Wrightsman ever voluntarily addressed this problem. We agree with the State that Wrightsman's reliance on *Jordan v. State*, 787 N.E.2d 993, 996 (Ind. Ct. App. 2003) is misplaced. While Jordan specifically requested the trial court to consider alternative placement, here, Wrightsman did not make such a request. Rather, besides the single substance abuse treatment which occurred when he was incarcerated at the

Boys School in 1997, Wrightsman has not taken any positive steps to treat his multiple addictions.

Next, in support of his argument that prior unsuccessful attempts at rehabilitation is an improper aggravator, Wrightsman references *Morgan v. State*, 829 N.E.2d 12 (Ind. 2005). In *Morgan*, our supreme court clarified the trial court's role in characterizing the aggravators for purposes of *Blakely* sentencing after a jury engaged in fact finding or the defendant admitted to certain facts. The court held that the Sixth Amendment is not implicated or endangered by permitting a trial judge to use aggravators to enhance sentences so long as the underlying facts supporting the aggravator are found by a jury or admitted by a defendant and are meant as a concise description of what the underlying facts demonstrate. *Id*. at 17-18. However, we find *Morgan* to be inapposite to the instant case. Unlike Morgan, Wrightsman waived his *Blakely* rights, and therefore the trial court appropriately engaged in independent judicial fact finding.

With regard to the aggravator of nature and circumstances of the crime, Wrightsman alleges that the trial court's findings constituted nothing more than a mere recitation of the statutory aggravator. While a trial court may not use a factor constituting a material element of an offense as an aggravating circumstance, a court may look to the particularized circumstances of the criminal act. *Henderson v. State*, 769 N.E.2d 172, 180 (Ind. 2002). The record demonstrates that at the sentencing hearing, the trial court clarified the imposition of this aggravator as "[t]his crime was [a] horrible, senseless, violent crime." (Appellant's App p. 73). Accordingly, the trial court did – albeit summarily- explain why the statutory aggravator of the nature and circumstances

of the crime was imposed. Furthermore, the gravity of this aggravator is apparent from the factual basis put forth at the guilty plea hearing, the pre-sentence report, and the argument presented at the sentencing hearing. The facts recited by Wrightsman are short and disturbing. He and his friends beat up two men with metal poles, a rope, a switch, and knives. These beatings were sufficiently violent to result in serious bodily injury. Therefore, we find the nature and circumstances of the crime, as specified by the trial court, to be a proper aggravator.

B. *Mitigator*

In the instant case, the trial court found one mitigator: the fact that Wrightsman took responsibility for his actions by entering into a plea agreement. However, Wrightsman now claims that the trial court failed to mention his mental illness as an additional significant mitigator. The trial court is not required to find mitigating factors or to accept as mitigating the circumstances proffered by the defendant. *Powell*, 751 N.E.2d at 317. "Only when the trial court fails to find a significant mitigator that is clearly supported by the record is there a reasonable belief that it was overlooked." *Id.*

With regard to mental illness as a mitigator, we have held that trial courts should consider on the record what mitigating weight, if any, to accord the evidence of mental illness. *Id.* at 318. While the trial court is not obligated to give the evidence the same weight the defendant does; however, where documented, mental illness, especially if it has some connection to the crime involved, must be given some, and sometimes considerable, weight in mitigation. *Biehl v. State*, 738 N.E.2d 337 (Ind. Ct. App. 2000), *trans. denied*. Nonetheless, our supreme court cautioned us regarding "the need for a

high level of discernment when assessing a claim that mental illness warrants mitigating weight." *Covington v. State*, 842 N. E.2d 345, 349 (Ind. 2006). In *Ackney v. State*, 825 N.E.2d 965, 973 (Ind. Ct. App. 2005), *trans. denied*, we acknowledged that our supreme court identified four factors "that bear on the weight, if any, that should be given to mental illness in sentencing." Those considerations are: (1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime. *Id*. *See also Weeks v. State*, 697 N.E.2d 28, 30 (Ind. 1998).

The record before us includes a psychological evaluation of Wrightsman, performed by Jeff Vanderwater-Piercy, Ph.D. (Dr. Vanderwater-Piercy), a licensed clinical psychologist. In his conclusion, Dr. Vanderwater-Piercy states the following findings, in pertinent part:

> Given his history of mental health services, it seems reasonable that [Wrightsman] has a bona fide psychiatric illness. His mental health records from Wabash Valley Outpatient Services would be of considerable use in verifying the nature and severity of his mental health problems. However, his presentation and response style within the context of the current evaluation were suggestive of efforts to magnify and possibly fabricate psychiatric symptoms. In completing the psychological testing, [Wrightsman] reported an exceedingly large number of symptoms and problems, thereby invalidating the test results. In addition, [Wrightsman] submitted writings and drawings that emphasized and dramatized his mental illness, and at one point during the evaluation he eagerly asked the examiner if he was schizophrenic. Interestingly, there was a very sadistic theme to his writings, which is in keeping with the nature and severity of the beatings to which [Wrightsman] pled guilty. When questioned about the beatings, [Wrightsman] denied any recollection, stating that he had "blacked out" and could not recall his actions. However, [Wrightsman]

> previously provided the police with specific details of his behavior during the investigation leading to his arrest.

(Appellant's Green App. pp 19-20).

Furthermore, in the pre-sentence investigation report, Wrightsman asserted that he had been diagnosed with depression and anxiety and had received outpatient care for those conditions since 1997. He also indicated that he has been receiving social security disability for depression since 2003. Nevertheless, in response to the State's cross-examination during the sentencing hearing, Wrightsman never mentioned any mental illness when asked to explain his reason for committing the crimes. Rather, his responses and questions during this hearing were completely appropriate and indicated a normal level of functioning.

Other than the possible implications of his juvenile adjudications and adult arrest record, it appears that Wrightsman was capable of controlling his behavior, did not have significant limitations on his functioning, and failed to identify a nexus between his mental illness and the instant offense. Based on this evidence, we find that Wrightsman's mental illness should have been accorded little weight as a mitigating factor. While it was error for the trial court to fail to explain any evaluation it conducted as to this potential mitigating circumstance, such was harmless under these circumstances. As we affirmed the trial court's finding of significant aggravators, we conclude that the limited weight we accord to the mitigating circumstance of Wrightsman's mental illness does not upset the trial court's proper balancing of aggravators and mitigators.

C. *Appropriateness of the Sentence*

Lastly, Wrightsman contends that his sentence is inappropriate in light of the nature of the crime and his character. Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *see also Rodriguez v. State*, 785 N.E.2d 1169, 1174 (Ind. Ct. App. 2003), *trans. denied*.

In the present case, Wrightsman pled guilty to two Counts of criminal confinement resulting in serious bodily injury, Class B felonies. The presumptive sentence for a Class B felony is ten years, with not more than ten years added for aggravating circumstances or not more than four years subtracted for mitigating circumstances. I.C. § 35-50-2-5. Here, the trial court imposed the maximum sentence on each of these two Counts. Additionally, Wrightsman pled guilty to a habitual offender adjudication. Although there is no presumptive sentence for a habitual offender charge, the trial court may not enhance the sentence for the underlying offense by more than three times the presumptive sentence of the underlying offense. I.C. § 35-50-2-8(h) ; *see also Goodall v. State*, 809 N.E.2d 484, 585-86 (Ind. Ct. App. 2004). In the instant case, the trial court imposed a twenty-five year sentence for the habitual offender finding, whereas the maximum sentence allowed under the statute would have been thirty years.

The nature of the offense shows the particularly brutal and savage beatings of two men who were tied up and helpless at the time of the beatings. These beatings were substantial, resulting in serious bodily injury. With regard to Wrightsman's character, we find that although Wrightsman's criminal history does not contain any violent crimes, his

criminal behavior is clearly escalating and gaining in speed. His juvenile record shows an adjudication for criminal mischief and resisting law enforcement. Despite being placed on probation for these true findings, Wrightsman violated the terms of his probation until the trial court sent him to Boys School. Within a few months of his release in 1999, he acquired his first adult arrest for misdemeanor conversion which was subsequently dismissed as part of a plea agreement in his criminal case which involved a Class A misdemeanor possession of marijuana. Following a second misdemeanor possession of marijuana conviction, Wrightsman was charged with a Class D felony theft in 2001, and again in 2002. A petition to revoke probation was pending in both theft charges at the time of sentencing in the case before us. His substantial criminal history combined with his substance abuse history, clearly indicate that Wrightsman refuses to adjust his behavior to the rules of society. Accordingly, in light of the evidence before us, we find that the trial court appropriately sentenced Wrigtsman in light of the nature of the offense and his character.

D. *Habitual Offender Adjudication*

As a final issue, we address the State's argument raised in footnote 2 of its brief, asserting that that trial court did not properly impose the sentence for the habitual offender count. Specifically, the trial court ordered the twenty-five year habitual offender sentence served consecutively to the twenty-year concurrent sentences for the two Counts of criminal confinement resulting in serious bodily injury. We agree with the State that a habitual offender finding does not constitute a separate crime nor does it result in a separate sentence. *Barnett v. State*, 834 N.E.2d 169, 173 (Ind. Ct. App 2005).

Rather, it results in a sentence enhancement imposed upon the conviction of a subsequent felony. *Id*. Thus, the trial court erred in imposing a separate, consecutive habitual sentence. Therefore, we remand to the trial court with instructions to enhance the sentence of one of the Class B felony Counts with the twenty-five year habitual offender sentence. *See id.*

CONCLUSION

Based on the foregoing, we find that the trial court properly sentenced Wrightsman. We remand to the trial court with instructions to attach the habitual offender enhancement to one of the Class B felony charges.

Affirmed in part, reversed in part, and remanded with instructions.

KIRSCH, C.J., and FRIEDLANDER, J., concur.